No. 12226

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HELEN YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

(a) Jurisdiction.

1. This appeal is brought to test the validity of certain Federal Statutes, all in Title 38, U. S. C., namely, Sections 694, 694a, 694d, 697 and 715 thereof.

2. The Indictment, and particularly Counts Two [Tr. p. 5], Three [Tr. p. 6], Four [Tr. p. 8], Five [Tr. p. 9] and Six [Tr. p. 10], charge an alleged violation of the sections above cited. The Bill of Particulars [Tr. p. 11] shows that the Government relies upon these sections and these sections only as to the counts aforesaid. The Verdict [Tr. p. 14] shows that Appellant was acquitted on Count One, which is not here involved, and convicted on Counts Two to Six, inclusive.

It should appear clearly from the above, that this appeal lies definitely within the jurisdiction of this Honorable Court.

(b) Statement of the Case and Question.

The main question here involved is, whether or not the penal provisions of 38 U. S. C. 715 apply to Sections 694, 694a, and 694d of the same Code. This in turn involves the interpretation of Section 697, also of the same Code, which seeks to adopt certain other sections, including the penal provisions of Section 715 *(supra)*.

Respondent claims that the penal provisions of Section 715 *(supra)* have application to any violation of the civil sections above mentioned, and particularly to Section 694a. [Tr. pp. 5-11.]

Appellant contends that they do not, and has asserted this contention through her Motion to Dismiss [Tr. p. 12], her Motion for Judgment of Acquittal at the close of Plaintiff's Case in Chief [Tr. pp. 23-26], her renewal of said motion at the close of all testimony [Tr. p. 27], and her objection to an instruction given by the Court and numbered "13-C." [Tr. pp. 27-30.] Such instruction reads as follows:

"INSTRUCTION 13-C.

"Section 715 of Title 38 of the United States Code provides, in part, that:

" 'Any person who shall knowingly make or cause to be made, * * * or in any wise procure the making or presentation of a false * * * certificate * * * concerning any claim for benefits * * *'

under the Servicemen's Readjustment Act of 1944 shall be guilty of an offense."

It will be readily seen that all such motions to dismiss, motions for judgment of acquittal and objection to in-

struction are directed at the same identical point, which may be succinctly stated as follows:

Appellant contends that no penal provisions whatever attach to any violation of those civil sections heretofore quoted, *i. e.,* Sections 694, 694a and 694d, all of Title 38, U. S. C. A., and that the law provides no penalty for the filing of any documents understating the price charged any veteran for the purchase of any real property, or the construction of any house purchased or constructed under the provisions of the above quoted sections.

Respondent, on the other hand, contends that the law does attach such penalty under such sections, to such filing of such papers.

(c) The Errors Upon Which Appellant Relies Are as Follows.

1. That the Court erred in denying Appellant's Motion to Dismiss the Indictment [Tr. pp. 12-14] and each and every count thereof.

2. That the Court erred in denying Appellant's Motion for a Judgment of Acquittal at close of Plaintiff's case. [Tr. pp. 23-26.]

3. That the Court erred in denying Appellant's Motion for a Judgment of Acquittal at close of all testimony. [Tr. p. 27.]

4. That the Court erred in giving Instruction 13-C, set out in full hereinabove at page 2 hereof.

As will be readily seen, Appellant makes but one legal contention, namely, that the acts attributed to Appellant in Counts One to Six of the Indictment [Tr. pp. 5-12] do not nor do any of them set forth an offense against the Government. This point is further urged in that no penal language is to be found in 38 U. S. C. 694, 694a or 694d, and that the penal provisions of 38 U. S. C. 715 have no application to the first named sections.

(d) Argument.

Count Two of the Indictment [Tr. p. 5] charges that on or about July 1, 1946, Appellant "did knowingly cause a false certificate to be made concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U. S. C., Secs. 694, *et seq.*), in that (she) did inform * * * The Bank of America * * * that the amount to be paid by Lloyd Shearer, a Veteran * * * to purchase a lot and construct a house * * *, as to which a loan guarantee was being sought from the Government of the United States, was $9671.00, being made up of $1500.00 to purchase said lot, and $8171.00 to construct such house, and did cause said bank to certify in a Home Loan Report presented to the United States Veterans' Administrator, that the amount to be paid by such Veteran to purchase such lot and to construct such house was $9671.00, and did not exceed the reasonable value thereof of $9700.00, as determined by a proper appraisal * * *, made by * * * an appraiser designated by the Administrator of Veterans' Affairs; whereas, as (Appellant) well knew and caused to be concealed from said bank and the Veterans' Administrator, (Appellant) had caused said Veteran to sign a contract to pay $2200.00 for such lot and had caused said Veteran to sign a contract to pay cost plus 10%, with a minimum cost figure of $8200.00 and a maximum cost figure of $9000.00 for the construction of such house, and did demand of such Veteran the sum of $9000.00 for such construction, or a total of $11,200.00 for such house and lot."

Counts Three [Tr. p. 6], Four [Tr. p. 8], Five [Tr. p. 9] and Six [Tr. p. 10] are similar in every respect, excepting for the dates, amounts, and name of the Veteran.

The Code sections upon which the Government relies for its penalty may be summarized as follows [see Bill of Particulars, Tr. pp. 11-12]:

38 U. S. C. 694 is a section wholly civil in its nature, defining a Veteran within the scope of the Act, providing an automatic guarantee by the Government of certain portions of certain loans made to such Veterans, imposing certain conditions upon the making of such loans, including the length of amortization thereof, defining an honorable discharge, naming the lending agencies who may make such guaranteed loans, and making other general provisions.

The pertinent portions of 38 U. S. C. 694a are quoted in full hereafter:

> "Any loan made to a Veteran under this subchapter, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home, or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is automatically guaranteed if made pursuant to the provisions of this subchapter, including the following:
>
> * * * * * * * *
>
> (3) That the price paid or to be paid by the Veteran for such property, or for the cost of construction, repairs, or alterations, does not exceed the reasonable value thereof, as determined by a proper appraisal made by an appraiser designated by the Administrator."

38 U. S. C. 694d provides that the Administrator may promulgate rules and regulations for the carrying out of the provisions of the subchapter, and that he may designate certain employees of his department to exercise certain of his functions.

Attention is called to the fact that no penalty appears in any of the foregoing sections, nor is any penalty provided for the violation of any rules made pursuant to Section 694d *(supra)*.

38 U. S. C. 697 reads as follows:

> "Sec. 697. *Application of other laws; acceptance of uncompensated services; contracts with agencies or persons for service.*
>
> Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under sections 30a and 485 of Title 5 and sections 701-703, 704, 705, 707-715, and 716-721 of this title, and the provisions of sections 450, 451, 454a and 556a of this title, shall be for application under this chapter. For the purpose of carrying out any of the provisions of sections 30a and 485 of Title 5 and section 701-703, 704, 705, 706, 707-715, and 716-721 of this title, and this chapter, the Administrator shall have authority to accept uncompensated services, and to enter into contracts or agreements with private or public agencies, or persons, for necessary services, including personal services, as he may deem practicable. June 22, 1944, c. 268, Title VI, Sec. 1500, 58 Stat. 300."

The only section sought to be adopted by the last quoted or adoptive section which has any application herein is 38 U. S. C. 715, which reads as follows:

> "715. *False affidavit, declaration, voucher or writing.* Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher or paper, or writing purporting to be such, concerning any claim for benefits under this title [Secs. 701 to

703, 704, 706, 707 to 715, 716 to 721 of this title], shall forfeit all rights, claims, and benefits under this title [such sections], and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both. (Mar. 20, 1933, c. 3, Title I, Sec. 15, 48 Stat. 11.)"

It will be readily seen that the only penalty contained in any of the sections relied on by the Government in its indictment [Tr. pp. 5-11], or its Bill of Particulars [Tr. pp. 11-12], is to be found in Section 715 *(supra)*. In this connection it ought to be noted that Section 715 *(supra)* was passed March 20, 1933, and that all the other sections relied on by the Government were passed as parts of one Act, namely, World War II Servicemen's Readjustment Benefits, codified as Chapter 11c of Title 38, and commonly known as the "G. I. Bill of Rights," which was not adopted until June 22, 1944, eleven years later for the penal clause relied on.

Appellant's Contention.

Appellant contends:

1. None of the counts in the indictment of which she was convicted state an offense against the Government.

2. That Congress has attached no penalty to Sections 694, 694a or 694d of Title 38, U. S. C.

3. That 38 U. S. C. 697, the adoptive section, adopts, if anything, the whole of 38 U. S. C. 715.

4. That 38 U. S. C. 715 does not, and by reason of the date of its passage could not, attach any penalty to any of the above-mentioned sections, but on the other hand, attaches a penalty only to those sections which are named within it.

Appellant further contends, and will show from the cases hereinafter cited:

1. That Congress not only must have an intent to denounce an act as a crime, but must express such intent in clear and unequivocal language.

2. That it is not the function of the courts to supply in any law that which Congress has omitted, even inadvertently.

The Government's Contention.

The Government's theory seems to be that 38 U. S. C. 694a, which is not a penal section, has been violated by the Appellant; that 38 U. S. C. 697, which is not a penal section adopts, among other things, 38 U. S. C. 715 which in turn contains a penalty, and that such penalty, although expressly applied only to the sections quoted in the body of 38 U. S. C. 715, nevertheless in some fashion can be applied to the failure of Appellant to comply with the original civil section, 38 U. S. C. 694a.

The rule-making section, 38 U. S. C. 694d, is not considered in the above analysis, since it provides no penalty for the violation of any rule which may be made pursuant to it. *Grimaud v. U. S.*, 220 U. S. 506, sets forth the formula which must be followed in order that the courts may punish the violation of a rule made by a non-legislative official. This formula is so familiar as to justify brief paraphrasing here. It is, in short, that Congress must declare a policy, the carrying out of which requires rules. It must then designate an office, the holder of which it empowers to make rules pursuant to Congress' declared policy. It must then provide a penalty for the violation of the rules so made. The latter step is absent in 38 U. S. C. 694d.

Congress Must Provide the Penalty.

As early as 1812 the Supreme Court in *U. S. v. Hudson & Goodwin,* 7 Cranch 32, 3 L. Ed. 257, announced that the only court established by the Constitution was itself, and that all other federal courts derive their authority and even their existence from acts of Congress. Accordingly, it is said in this classical decision, the courts may not enforce any law not passed by Congress nor may they, no matter how great the urgency, supply any defect in any law which Congress has passed.

This doctrine has been preserved intact by all the courts since its announcement, and has been frequently repeated and elaborated upon. Perhaps its most dramatic expression is to be found in *Viereck v. U. S.,* 318 U. S. 236, 87 L. Ed. 734, 63 S. Ct. 561. At the time of the decision of the *Viereck* case (1942) we were at war. The offense charged against Viereck was close to treason, in supporting the cause of our principal enemy, Germany. In that year our cause was going badly and our war far from won. Nevertheless, in the face of all these circumstances which might have constrained the Supreme Court to read into the Acts of Congress more than they contained, in support of our very national existence, the Supreme Court said, on page 241 of volume 318 U. S.:

> "One may be subjected to punishment for a crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress."

In the same decision at page 243, the Court said further:

> "The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not other-

wise within its reach, however deserving of punishment his conduct may seem."

The last expression of the Supreme Court upon this subject, so far as the writer knowns, is to be found in *U. S. v. Evans,* not yet in a bound volume but set out in S. Ct., L. Ed., Advance Opinions, Vol. 92, page 585, *et seq.* This opinion, which is dated March 15, 1948, is by Mr. Justice Rutledge, all members concurring. The charge against Evans was that of violating 8 U. S. C. 144, in that he did harbor aliens not lawfully entitled to enter or reside within the United States. The Code section reads:

> "That any person * * * who shall bring into or land in the United States (or shall attempt to do so), or shall conceal or harbor, or assist or abet another to conceal or harbor in any place * * * any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000. and by imprisonment for a term not exceeding five years, *for each and every alien so landed or brought in or attempted to be brought in or landed."* (Emphasis added.) 39 Stat. 874, 880, C. 29, 8 U. S. C. A. Sec. 144, 2 FAC title 8, Sec. 144.

It will be seen that although the above section denounces both the bringing in of unauthorized aliens and their harboring, its penalty clause contains the language: "For each and every alien so landed or brought in * * *." The evidence in the *Evans* case points to harboring and not to bringing in. Defendant contended that 8 U. S. C. 144 did not denounce the harboring of aliens, and pro-

vided no penalty for so doing. The following excerpts from the opinion are quoted, each showing the page from which it is taken:

> "The case presents an unusual and difficult problem in statutory construction. It concerns not so much Congress' intent to make concealing or harboring criminal, as it does the penalty to be applied to those offenses * * *" (p. 586).

Here the Supreme Court has as much as said that Congress has shown an attempt to make harboring a crime, but that the statute as well as the prosecution of Evans, must stand or fall on the clarity with which Congress has expressed itself:

> "In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, nor judicial functions" (p. 587).

Thus it appears that the Supreme Court does not approve any judicial expansion of the legislative mandate.

> "In other words, because Congress intended to authorize punishment, but failed to do so, probably as a result of oversight, we should plug the hole in the statute" (p. 588).

The above quotation is a statement of the Government's position in the *Evans* case and, so we contend, in the instant case. In the former the Supreme Court refused to "plug the hole." The decision ends with the following language:

> "This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its functions, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law" (p. 592).

Indeed it would be better if Congress were to pass an intelligible act defining the purported offense herein sought to be prosecuted than for many defendants like these to be put to trial only to meet with reversal in the end.

Congress Did Not Intend to Define a Crime.

Had Congress believed that it had denounced any and all violations of any and all civil sections of the entire act by means of the adoptive Section 697 thereof, then it would not have had reason to place penal sections within the chapter. But 38 U. S. C. 696l is a penal section and 38 U. S. C. 696k is a quasi-penal section. Each is quoted hereafter:

> *"Sec. 696l. Penalties for false statements, misrepresentations, and unlawful acceptance of allowance.*
>
> (a) Whoever, for the purpose of causing an increase in any allowance authorized under this subchapter, or for the purpose of causing any allowance to be paid where none is authorized under this subchapter, shall make or cause to be made any false statement or representation as to any wages paid or received, or whoever makes or causes to be made any false statement, representation, affidavit, or document in connection with such claim, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $1,000 or imprisoned for not more than one year, or both.
>
> (b) Whoever shall obtain or receive any money, check, or allowance under this subchapter, without being entitled thereto and with intent to defraud the United States, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or both."

> *"Sec. 696k. Acceptance of unauthorized allowance.* Any claimant who knowingly accepts an allowance to which he is not entitled shall be inelligible to receive any further allowance under this subchapter."

38 U. S. C. 715 Applies Its Penalty Only to Veterans.

We respectfully urge that Section 715 *(supra)* which has been sought to be adopted, applies only to veterans and not to persons other than veterans who violate the several sections named within it. This is clear from a reading of the section itself, and particularly from the following excerpt therefrom:

> "Any person who shall knowingly make * * * or in any wise procure the making * * * of any false or fraudulent affidavit concerning any claim for benefits under section 701 * * * shall forfeit all rights, claims, and benefits under such section * * *."

Since none other than veterans have any rights or claims to forfeit under the quoted sections, we urge that Section 715 *(supra)* was directed by Congress against offenses committed by veterans and not against persons who dealt with veterans.

Conclusion.

We conclude therefore as follows:

(a) That this Honorable Court has jurisdiction of this appeal.

(b) That the court below erred in denying Appellant's Motion to Dismiss the indictment, as well as Appellant's two Motions for Judgment of Acquittal, and further erred in instructing the jury as shown in Instruction 13-C, quoted hereinabove.

(c) That Appellant has been convicted of violating a section which is purely civil in its nature.

(d) That Congress had no intent to denounce the acts of Appellant as set forth in the several counts of the indictment.

(e) That even though Congress had intended to denounce the acts attributed to Appellant, it has failed to do so.

(f) That the judgment appealed from should be reversed.

Respectfully submitted,

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Attorney for Appellant.